Supreme Court, U.S.
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No. 89-1905

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/
TURF COALITION,

Respondents.

ON WRIT OF CERTIORARI TO THE
WISCONSIN SUPREME COURT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Supremacy Clause of the United States Constitution, is the authority of local units of government to enact ordinances in the exercise of their police powers to protect their citizens and environments from hazards of chemical pesticides preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§136-136y (1988)?

2. Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens?

LIST OF PARTIES

The parties to these proceedings are the same as those to the proceedings below, and are all stated in the caption of this case. The petitioners (original defendants) are the State of Wisconsin Public Intervenor and Town of Casey, Wisconsin, Imbert M. Eslinger, Louis N. Place, Roland K. Colby. The respondents (original plaintiffs) are Ralph Mortier and Wisconsin Forestry/Rights-of-Way/Turf Coalition.

Page

TABLE OF CONTENTS

Page

Page

Page

CASES CITED

Page

Page

Page

Page

Page

STATUTES AND RULES CITED

Federal Statutes

Page

Federal Acts

Wisconsin Statutues

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Page

Page

Page

OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as Mortier v. Town of Casey, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) (I App. A to Cert. Petn. at 1).[1]

The decision of the Washburn County, Wisconsin Circuit Court in Ralph Mortier, et al. v. Town of Casey, et al., is in 1) the PARTIAL TRANSCRIPT -- FINDINGS BY THE COURT MOTION HEARING (R. 33:1-7) and 2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Case No. 86-CV-134 (Filed June 16, 1988) (R. 28:1-4) (II App. B to Cert. Petn.).

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[1]Citations to "App. to Cert. Petn." are to the Appendix to the Petition for Writ of Certiorari. By motion dated January 25, 1991, petitioner requested the Court to dispense with the requirement for a Joint Appendix on the grounds that it would be completely redundant with the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a) (1988).

Here a final judgment was entered by the Wisconsin Supreme Court, the highest court in the State of Wisconsin, by opinion filed March 12, 1990, on the above-captioned matter. That judgment voided a local ordinance on the ground that that ordinance was preempted by federal law (FIFRA), and therefore was repugnant to the Supremacy Clause of the United States Constitution.

> The controlling question arises under art. VI, clause 2, of the United States Constitution, the supremacy clause, which provides that all laws of the United States made pursuant to the Constitution are "the supreme law of the land . . . any thing in the constitution or laws of any state to the contrary notwithstanding."

Mortier v. Town of Casey, 154 Wis. 2d at 21, 452 N.W.2d at 556. Within 90 days of the Wisconsin Supreme Court decision, on June 5,

1990, petitioner filed in this Court and served on the parties under Supreme Court Rule 13, a petition for writ of certiorari to review the Wisconsin Supreme Court decision. The United States Supreme Court may grant a petition for writ of certiorari under 28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn into question on the ground that it is repugnant to the Constitution, . . . or laws of the United States . . . .

A local ordinance is deemed a state statute for purposes of invoking the jurisdiction of the United States Supreme Court. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, on remand, Immuno Intern, A.G. v. Hillsborough County, Fla., 775 F.2d 1430 (11th Cir. 1985). The Court may review the validity of a local ordinance which was

assailed as unconstitutional by final judgment or decree of the highest state court in which a decision could be had. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitutional Provisions

Article VI, Clause 2 Supremacy Clause

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The Tenth Amendment

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136(aa), 136v(a) and (b), 136t(b) (1988).

7 U.S.C. §136(aa):

> **State.**--The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. §136v(a) and (b):

Authority of States

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. §136t(b):

> (b) **Cooperation.**--The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter, and in securing uniformity of regulations.

Ordinances

Town of Casey, Washburn County, Wisconsin Ordinance No. 85-1 (1985) (R. 28:1-4, 33:1-7; II App. C to Cert. Petn.).

STATEMENT OF THE CASE

Proceedings Below

This case is before the Court on order granting a petition for writ of certiorari to review the Wisconsin Supreme Court decision that affirmed a Washburn County, Wisconsin, Circuit (trial) Court decision and order (R. 28:1-4, 33:1-7; II App. B to Cert. Petn.) declaring Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (II App. C to Cert. Petn.), "void, invalid and of no effect."

The ordinance requires a permit from the town prior to application of pesticides to public lands, private lands subject to public use, and to aerial application of pesticides in the town. Ord. §1.2. Under the ordinance, permit decisions are to be

made after applicants submit adequate information upon which intelligent decisions can be made. Ord. §1.3. Hearing rights are provided. Ord. §1.3(4) and (5). A nominal application fee is required. Ord. §1.3(6). And public notice of pesticide applications through placarding is required. Ord. §1.3(7). Each violation of the ordinance carries "a forfeiture of up to $5,000.00." Ord. §2.

Respondents challenged the validity of the ordinance in the Washburn County Circuit Court, Case No. 86-CV-134, naming the Town of Casey and named town board members as defendants. Amended Complaint, R. 18:1-30. The Wisconsin Public Intervenor, acting pursuant to Wis. Stat. §§165.07 and 165.075,[2] was admitted by the court on

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[2]The Wisconsin Public Intervenor is an assistant attorney general charged under Wis. Stat. §§165.07 and 165.075 with the specific duty of intervening and initiating actions in any court or agency for "the protection of 'public rights' in the water

(continued...)

motion (R. 6:1-13) and without objection as a party defendant. R. 11.

By amended motion dated December 1, 1986, R. 21:1-2, respondents moved for summary judgment alleging the town's ordinance was invalid on the grounds it was preempted by federal and state law, and interfered with the federal regulatory scheme. No other grounds were alleged or briefed. The reasonableness of the

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[2](...continued)
and other natural resources" of the state. The intervenors do not represent all rights and interests within the scope of those authorized to be represented by the Wisconsin Attorney General, and because the intervenors' advocacy on behalf of environmental "public rights" sometimes requires the bringing of actions against Wisconsin state agencies often represented by the Attorney General, the Public Intervenor does not appear here on behalf of the State of Wisconsin, the Wisconsin Attorney General, the Governor, or any state agency other than the Office of Wisconsin Public Intervenor. For a discussion of the Wisconsin Public Intervenor, see Dubois, P., Christenson, A., "Public Advocacy and Environmental Decisionmaking," Environmental Quality Series, Monograph No. 26, University of California-Davis (1976), copies of which will be gladly provided to the Court and the parties on request.

ordinance, or any of its parts, were not contested in the motion.[3]

The Washburn Circuit Court granted respondents' motion and declared void the town's ordinance, and impliedly all others like it, as preempted by both state and federal laws (R. 28:1-4, 33:1-7; II App. B to Cert. Petn.).

The order, supported by findings of fact and conclusions of law by the Washburn County Circuit Court, enjoined the Town of Casey and town officials from enforcing Ordinance 85-1. The grounds in support of the order were that: the ordinance was

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[3]The motion (R. 21:1-2) did not address the Commerce Clause Claim in the Amended Complaint (R. 18:14). But, where it is found Congress does not preempt or preserves state and local regulation in the field, the "exercise of that power does not represent an 'unreasonable' and therefore impermissible burden on interstate commerce." National Agr. Chemicals Ass'n v. Rominger, 500 F. Supp. 465, 471 (E.D. Cal. 1980), citing Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). See also Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541 (D.C. Cir.), cert. den., 469 U.S. 1062 (1984).

preempted by federal law through FIFRA, 7 U.S.C. § 136-136y (1988); Congress intended to preempt the regulation of pesticides by local governments; local pesticide regulation is preempted by state law; and the ordinance conflicts with federal and state laws and regulations.

Appeal was made to the Wisconsin Court of Appeals. The Wisconsin Supreme Court accepted the case on bypass of the court of appeals pursuant to the joint petition of all parties. Mortier, 154 Wis. 2d at 20 n.2, 452 N.W.2d at 555 n.2. A divided Wisconsin Supreme Court affirmed the order of the Washburn County Circuit Court exclusively on the federal pre-emption question. Id.

On June 5, 1990, the Wisconsin Public Intervenor filed in this Court and served on the parties a petition for a writ of certiorari to the Wisconsin Supreme Court for review of that court's decision. On or

about July 3, 1990, and August 13, 1990, respondents filed and served a brief and supplementary brief in opposition to the petition for certiorari. By order of October 1, 1990, the Court invited the United States Solicitor General to file a brief stating the views of the United States on the petition.

On December 21, 1990, the Solicitor General filed his brief, stating his position that it would be appropriate for the Court to grant the petition and to reverse the Wisconsin Supreme Court's holding that FIFRA preempts local regulation of pesticides. The Solicitor General recommended the Court grant the petition with respect to the first question raised in the petition. "The question whether FIFRA preempts regulation by local governments of pesticide use warrants review by this Court." Brief for the United States at 3. The Solicitor General suggested the Court

not grant certiorari on the second question raised, that being,

> Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens.

Brief for the United States at 15 n.16.

On January 14, 1991, the Court granted the writ of certiorari without qualification.

Other Cases In Conflict On The Issue

The Wisconsin Supreme Court decision on the federal preemption question presented here conflicts with the state court of last resort decisions in People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), and Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189 (Me.

1990). The Maine and California decisions are in conflict with the Wisconsin Supreme Court decision, the sixth circuit court decision in Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3180 (Aug. 31, 1990) (No. 90-382), and the federal district court decision in Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109 (U.S.D.C. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987). One other federal district court decision on the same federal issue is consistent with the California and Maine decisions, and is on appeal in the tenth federal circuit court: COPARR Ltd., et al. v. City of Boulder, 735 F. Supp. 363 (D. Colo. 1989) (II App. D to Cert. Petn.), appeal docketed No. 89-1341 (10th Cir., Nov. 1, 1989), appeal stayed Jan. 15, 1991, pending outcome of Mortier.

SUMMARY OF ARGUMENT

Deference to "the historic police powers of the states" and their role in the federal system requires that preemption of state authority under the Supremacy Clause be "the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Preemption of local ordinances is analyzed in the same way as preemption of state laws. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. at 713-14. States, of course, commonly exercise their police powers by delegating regulatory authority to local and municipal governments. See Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) [7 U.S.C. §136v] does not evince a clear and manifest purpose of Congress to preempt local governments from enacting pesticide use regulations.

First, Congress expressly preserved the authority of the states to exercise their historic police powers to regulate "the sale or use of any federally registered pesticide . . . to the extent the regulation does not permit any sale or use prohibited by [FIFRA]." FIFRA §24(a) [7 U.S.C. §136v(a)]. The act clearly contemplates concurrent regulation by state and federal authorities of the sale and use of pesticides.

Second, although Congress expressly dealt with preemption in the law [FIFRA §24; 7 U.S.C. §136v], there is no provision in FIFRA expressly prohibiting local governmental agencies from regulating the use of pesticides, expressly providing the term "State" excludes such agencies, or providing that states may not act through their local agencies.

Third, under FIFRA §24(b) [7 U.S.C. §136v(b)] Congress expressly preempts states only in the narrow field of pesticide

labelling and packaging, and under §24(a) where state regulation would "permit any sale or use prohibited by this Act." These provisions necessarily imply Congress intended to preempt states and their local governments only in the narrow areas specified. It would be absurd to interpret these provisions preempting states as excluding municipalities, so as to allow local governments to regulate in areas Congress exclusively reserved to the federal government.

Fourth, the instruction in FIFRA §22(b) [7 U.S.C. §136t(b)] to the federal Environmental Protection Agency Administrator to cooperate with "any State or any political subdivision thereof . . . in securing uniformity of regulations," would be meaningless unless Congress intended there would be authority in local governments to adopt pesticide use regulations.

Fifth, courts finding that FIFRA preempts local regulation have made the fundamental mistake of applying the "express mention-implied exclusion" rule to the FIFRA §2(aa) [7 U.S.C. §136(aa)] definition of "State," then inserting the resulting definition into the "anti-preemption" provision of FIFRA §24(a), so as to exclude municipalities from their condition of "anti-preemption." See California Federal Savings & Loan Association v. Guerra, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring). Application of the maxim's definition of "State" to the FIFRA's preemption provision defeats Congress' intent to preempt state and local governments from regulating pesticide labelling and packaging. More importantly, the maxim's use necessarily assumes erroneously the issue in the preemption analysis is whether Congress in the anti-preemption provision clearly allowed state

governments to delegate pesticide regulatory responsibilities to their local governments.

Sixth, the legislative history of FIFRA (set forth in Deukmejian, 683 P.2d 1158-59) shows the Congress agreed to disagree on the issue of local preemption. Despite addressing the issue of local preemption head-on, congressional committees and individual legislators failed to get language preempting local governments into the express preemption section of the law. That others failed to get "anti-preemption" language into the law for local governments does not evince an affirmative "clear and manifest purpose of Congress" to preempt. The House of Representatives did not address preemption of local governments from regulating pesticide use at all, and the full Congress acting on the compromise conference bill did not vote on the issue. Deukmejian, 683 P.2d at 1160-61.

Seventh, the regulation of pesticides by federal and state governments is not adequate or so comprehensive as to give rise to an inference that Congress intended to displace local government regulation. Because of inadequacies in the federal regulatory program, the environment and "the public's health may be at risk from exposure to these pesticides." General Accounting Office, LAWN CARE PESTICIDES--Risks Remain Uncertain While Prohibited Safety Claims Continue (March 1990) at 5. The federal law is not comprehensive. It does not cover many crucial areas left in the pesticide regulatory arena that local ordinances do, such as timing pesticide applications to reduce public exposure, protecting vulnerable local ground and surface public water supplies, or tailoring pest management alternatives and conditions to be responsive to local needs. Even comprehensive federal regulation would not show Congress clearly

intended to preempt the field. Hillsborough, 471 U.S. at 717-19.

Eighth, interpreting FIFRA as preempting local government regulation of pesticides would be inconsistent with the deference required under the Supremacy Clause to states which normally may distribute power to their political subdivisions, and is in conflict with the federal Safe Drinking Water Amendments of 1986 and the EPA's Ground-Water Protection Strategy which specifically encourage local regulation of pesticide use to protect local groundwater supplies.

Lastly, if FIFRA were interpreted to preempt local governments from regulating pesticide use, the issue would arise whether Congress may, consistent with fundamental rules of federalism embodied in the Tenth Amendment, interfere with the states' power to distribute internally their traditional powers of regulation. Deukmejian, 683 P.2d

at 1161 n.11. Because FIFRA can be interpreted as not preempting states from delegating power to local governments, the constitutional issue can and should be avoided. U.S. v. Security Indus. Bank, 459 U.S. 70, 78 (1982).

ARGUMENT

THE STATE AUTHORITY TO DELEGATE, AND THE LOCAL GOVERNMENT AUTHORITY TO EXERCISE, THE POLICE POWER TO PROTECT CITIZENS AND THE ENVIRONMENT FROM PESTICIDES HAS NOT BEEN PREEMPTED BY FEDERAL LAW.

A. The Federal Preemption Test.

Neither the state trial court nor the Wisconsin Supreme Court made a finding, nor could they, that federal law expressly preempts local pesticide ordinances. The courts found only implied preemption. In so doing, the court did not follow the governing rules on the issue.

Congress can preempt regulation of an area in a variety of ways.

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law . . . , when there

> is outright or actual conflict between federal and state law . . . , where compliance with both federal and state law is in effect physically impossible . . . , where there is implicit in federal law a barrier to state regulation . . . , where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law . . . , or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 368-69 (1986) (citations omitted).

It is well established that congressional intent to preempt must be unmistakably clear. For purposes of the Supremacy Clause, the preemption of local ordinances is analyzed in the same way as preemption of state laws. Hillsborough, 471 U.S. at 713-14. A court must be firmly convinced that Congress has clearly manifested its intent to preempt local regulation before striking down local health

and safety regulations. Southern Pacific Co. v. Arizona, 325 U.S. 761, 766 (1945).

Implied preemption is not favored. As stated in Rice, 331 U.S. at 230, "we start with the assumption that the historic police powers of the states were not superseded by the federal act unless that was the clear and manifest purpose of Congress." See also, e.g., Huron Portland Cement Co. v. Detroit, 362 U.S. at 440, and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. den., 471 U.S. 1140 (1985), quoting Rice v. Santa Fe Elevator Corp.. See also State ex rel. Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21 (Ct. App. 1988).

In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 147 (1963), the Court described the required showing as being a demonstration of "an unambiguous congressional mandate" to affirmatively pre-

empt state regulation. The rationale for this rule was explained by the Court, 373 U.S. at 146:

> The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress."

See also Rice v. Santa Fe Elevator Corp., and Jones v. Rath Packing Co., 430 U.S. 519 (1977).

The court in Chevron v. Hammond, states that the "'exercise of federal supremacy is not lightly to be presumed' [citation omitted]. The justification for such caution is that Congress certainly has the power to 'act so unequivocably as to make it clear that it intends no regulation but its own' [citation omitted]." id., 726 F.2d at 488.

An even stronger presumption applies when the claim is that Congress impliedly

preempted the power of the states to allocate governmental powers as they choose, such as to local governments that regulate activities touching interests deeply rooted in local feeling and responsibility.

> But even when Congress may be said to have manifested an intent to preempt state regulation in a particular field, a state is not automatically stripped of all authority to act in that area. When the regulated activity touches interests which are especially "deeply rooted in local feeling and responsibility," there is no preemption. Brown v. Hotel Employees, 468 U.S. 491, 502 (1984) (citations omitted); . . . . A state will not be deprived of jurisdiction over matters of exceptional local interest unless there is a "compelling congressional direction" to desist from enforcing local law. Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977).

State ex rel. Cornellier v. Black, 114 Wis. 2d at 753, 425 N.W.2d at 24 (citations omitted); Mortier, 154 Wis. 2d at 46, 452 N.W.2d at 567 (Steinmetz, J., dissenting). Thus the presumption against preemption is

particularly strong when the challenged regulation concerns an area that is traditionally subject to local control. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740 (1985); Hillsborough, 471 U.S. at 715; Jones v. Rath Packing Co., 430 U.S. at 525. States and political subdivisions of states have traditionally regulated issues affecting the health and safety of their citizens and have enjoyed great latitude under their police power to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons." Slaughter-House Cases, 16 Wall. 36, 62, 21 L.Ed. 394, 404 (1873), quoting Thorpe v. Rutland and Burlington R.R. Co., 27 Vt. 140, 149 (1855).

> The Court's reluctance to infer preemption is grounded in its deference to the role of states in our federal system. If congressional intent to purpose is ambiguous, courts should be slow to find preemption, "[f]or the state is powerless to remove the ill effects of our decision, while the national government,

> which has the power, remains free to remove the burden." Penn Dairies v. Milk Control Comm'n, 381 U.S. 261, 275 (1943).

Mortier, 154 Wis. 2d at 34, 452 N.W.2d at 561-62 (Abrahamson, J., dissenting).

It is not enough for preemption proponents to present mere indicia supporting an arguable inference of intent to preempt. In the face of the heavy presumption against preemption, indicia in the law of the intent not to preempt, ambivalence in legislative intent to preempt, and the deference that is owed to the states to distribute regulatory authority to their local governments, preemption challenges such as this one must fail.

B. Congress Expressly Preserved The Right Of States To Regulate Pesticides Under Their Historic Police Powers.

Although no "anti-preemption" provisions are generally necessary in federal laws to preserve the states'

traditional exercise of police powers, FIFRA §24(a) [7 U.S.C. §136v] expressly preserves the historic police powers of the states to regulate "the sale or use of any federally registered pesticide . . . but only if and to the extent the regulation does not permit any sale or use prohibited by this Act." The act clearly contemplates concurrent regulation by state and federal authorities in the sale and use of pesticides, with state regulation being as strict or stricter than federal regulation. "To put it bluntly, except as to labeling and packaging, a congressional intent to prohibit any registration which differs from the federal requirements is simply not to be found on the face of the statute." Rominger, 500 F. Supp. 465, 469 (E.D. Cal. 1980). The same can be fairly said for the regulation of pesticide use.

C. Congress Has Not Expressly Preempted State Or Local Units Of Government From Regulating Pesticide Use.

> There is no provision in FIFRA expressly prohibiting local governmental agencies from regulating the use of pesticides, expressly providing that the term "State" excludes such agencies, or providing that the state may not act through its local agencies.

Deukmejian, 683 P.2d at 1158.[4]

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[4]In the Wisconsin Supreme Court respondents' cited Chemical Specialties Manufacturers Association v. Clark, 482 F.2d 325 (5th Cir. 1973), in support of their implied preemption argument. We welcome it. There, the court found the express preemption clause that is necessary to preclude local regulation of detergent labelling. More notably, review of FIFRA §24(b) [7 U.S.C. §136v(b)] reveals that Dade County's concession of FIFRA preemption of local detergent pesticide labelling (id. at 327 n.4) is based on the express language in FIFRA specifically prohibiting states (and local governments) from imposing additional requirements on pesticide labels. It is precisely this level of clear intent to preempt that is lacking with respect to local regulation of pesticide use.

See also New York State Pesticide Coalition, Inc., et al. v. Jorling, 874 F.2d 115 (2nd Cir. 1989), in which the Second Circuit Court of Appeals recently held that state posting and notice requirements for

(continued...)

Where implied preemption has been found, it has been based on inferences raised from FIFRA and legislative history.

D. FIFRA Evinces A Congressional Intent Not To Preempt Local Governments From Regulating Pesticide Use.

Express language in FIFRA strongly implies Congress contemplated local regulation in the field.

First, the chief express preemption provision in FIFRA, §24(b) [7 U.S.C. §136v(b)] necessarily implies that local units of government are contemplated within the coverage of the term "States," which are preempted from regulating pesticide labelling or packaging. Chemical Specialties Manufacturers Association v. Clark, 482 F.2d 325, 327 n.4 (5th Cir. 1973). It is clear Congress wanted the U.S. Environmental Protection Agency (EPA) to have exclusive

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[4](...continued)
lawn care applicators were not preempted by FIFRA's express preemption of state labelling laws.

authority over this area of pesticide regulation. It only follows then under FIFRA §24(a) [7 U.S.C. §136v(a)], that with the "States" that are left free to "regulate the sale or use of any federally registered pesticide or device in the State," local governments also are necessarily implied to retain their delegated state authority to so regulate.[5]

Second, FIFRA §22(b) [7 U.S.C. §136t(b)], states:

> (b) Cooperation.--The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of

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[5]None of the courts holding in favor of local preemption have discussed, or appear to have even considered, a plain reading of FIFRA §24(b) as necessarily including municipalities within the term "State." Yet, this is the only reading that is compatible with the meanings of §§2, 24(a) and 24(b), while excluding municipalities from "States" in §24(b) yields the absurd result of authorizing local governments to regulate pesticide labelling and packaging.

> this act, and in securing uniformity of regulations.

The instruction in this section to the EPA administrator to cooperate with any political subdivision (municipality) of a state to secure uniformity of regulations would be meaningless if local subdivisions were not viewed as retaining their authority to adopt regulations in the first place. By adopting this provision, Congress contemplated there would be the authority in municipalities to adopt pesticide regulations for which the goal of uniformity would be sought through cooperation with the administrator.

E. FIFRA §§2 And 24 Do Not Demonstrate Express Or Implied Intent To Preempt Local Regulation Of Pesticide Use.

The Wisconsin Supreme Court rejected respondents' argument that Congress' use of the term "State" in FIFRA §24 [7 U.S.C. §136v], allowing states to retain their authority to regulate sale or use of

pesticides, is an express or clear intent to exclude their political subdivisions from regulating. "Because it is not clear that the statutory language alone evinces congress' manifest intent to deprive political subdivisions of authority to regulate pesticides, it is ambiguous." Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58.

Only after reviewing FIFRA's legislative history, and applying the "express mention, implied exclusion" rule, did the court conclude that Congress must have meant the term "State" in FIFRA §§2(aa) [7 U.S.C. §136(aa)] and 24(a) to exclude local governments from the "anti-preemption" provision of §24(a). Mortier, 154 Wis. 2d at 28-29, 452 N.W.2d at 558-59. Referring to FIFRA §2(aa) defining "State," without even considering this definition's application to the preemption provision itself [§24(b)], the court concluded, "This

provision in itself is persuasive under the exclusion rule[6] that omitted governmental entities such as the Town of Casey are excluded or deprived of the right to regulate the use of pesticides." Mortier, 154 Wis. 2d at 29, 452 N.W.2d at 560. This line of reasoning is inherently flawed.

First, FIFRA §2(aa) does not expressly exclude local governments from the definition of "States." Deukmejian, 683 P.2d at 1158. Congress could have expressly excluded local governments from the definition simply by stating the term "does

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[6]The term "exclusion rule" is used in the official reporter, while the term "exclusio rule" is used in the Northwest 2d reporter.

The "exclusion rule" to which the court refers appears to be the maxim expressio unius est exclusio alterius, "the expression of one thing excludes others not expressed." Bailey v. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 500 (8th Cir.), reh. and reh. en banc den., cert. den., 479 U.S. 915 (1986). The maxim is used here to support the claim "that the reference to 'State' should be read as excluding local governmental regulation." Deukmejian, 683 P.2d at 1160.

not include their political subdivisions." Congress did not.

Second, application of the court's definition of "States" under FIFRA §2(aa), so as to exclude their political subdivisions from FIFRA §24(a)'s broad allowance of state regulation in the field, yields an absurd result when the definition is applied to the actual express preemption provision in FIFRA §24(b). While the court's definition of state (excluding local governments) would deprive local governments of the power to regulate pesticide use under §24(a), it would at the same time under §24(b) authorize local governments to regulate pesticide labelling and packaging, an area where their own states, by express preemption, may not. "Although sub. (b) only expressly prohibits states from dealing with labeling, it impliedly includes preemption of local governmental units in this area also. Any other interpretation

would create an absurd result." Mortier, 154 Wis. 2d at 48, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Third, there is nothing in the FIFRA definition of the term "States" that remotely suggests local governments are not already to be considered creatures and arms of the states, as in fact they are. Deukmejian, 683 P.2d at 1160. This is the necessary intent in the very section of the act that does preempt state regulation in the field, FIFRA §24(b) [7 U.S.C. §136v(b)]. To assume that normally the term "States" in federal statutes that expressly preempt state authority does not include their local governments is to ignore the obvious and, as in this case, to inordinately deprive states of fundamental powers. Deukmejian, 683 P.2d at 1158, 1160-61.[7]

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[7]This is one reason why it is a fundamental mistake to point to the lack of "anti-preemption" language as evidence that a sub-federal governmental unit is preempted (continued...)

Fourth, the "exclusion rule" was improvidently applied by the Wisconsin court to dictate the intent of FIFRA.

> Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Deukmejian, 683 P.2d at 1160 (emphasis added). "This rule of exclusion . . . , is only an aid to statutory construction, not a rule of law." Campbell v. Wells Fargo

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[7](...continued)
from exercising its traditional police powers. Cf. California Federal Savings and Loan Association v. Guerra, 479 U.S. at 295-96 (Scalia, J., concurring) (federal preemption and the existence of "anti-preemptive" provisions are separate legal concepts deserving independent analysis). This truism is more clear where anti-preemption language is viewed to the exclusion of express preemption language in the same statute.

Bank, 781 F.2d 440, 442 (5th Cir.), reh. and reh. en banc den., cert. den., 476 U.S. 1159 (1986). The doctrine "should not prevail when a nonexclusive reading serves the purposes for which the statute was enacted or allows the exercise of incidental authority necessary to an expressed power or right." Bailey v. Federal Intermediate Credit Bank, 788 F.2d 498, 500 (8th Cir.), reh. and reh. en banc den., 479 U.S. 915 (1986), citing 2A Sutherland Statutory Construction §47.25 (Sands 4th ed. 1984 rev.) at 209.

> Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context.

U.S. v. Castro, 837 F.2d 441, 442-43 n.2 (11th Cir. 1988), citing R. Dickenson, The

Interpretation and Application of Statutes, 234-35 (1975). The Wisconsin court perfunctorily applied the maxim in such a way as to dictate the "clear intent" of the statute, much in the same way the proverbial tail wags the dog.

Fifth, that the term "States" should be presumed in preemption cases to include their political subdivisions should be especially true under the Supremacy Clause analysis that compels respect for the role of states in our federal system, which includes the right of states to create, empower and utilize local governments as arms of the states for fulfilling state policy.[8] It is just as plausible, if not more so, to conclude Congress contemplates "States" to include all of their political subdivisions, including their departments, "state agencies," and local governments that act as the arms of the state, than to assume

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[8]See discussion starting at 90.

the opposite. Deukmejian, 683 P.2d at 1160. Even if not, under the preemption analysis this should be the presumption unless clearly shown otherwise.

F. The Legislative History of FIFRA Does Not Demonstrate A Clear Congressional Intent To Preempt Local Regulation Of Pesticide Use.

1. The Wisconsin Supreme Court applied a fundamentally flawed test on preemption by requiring a showing that Congress did not allow local regulation of pesticide use.

A plain reading of FIFRA §24(b) leads to the conclusion that municipalities enjoy the same "anti-preemption" condition as states under §24(a), while exclusion of municipalities from the definition of "State" causes an absurd result when applied to §24(b). Thus, "[v]ery strong evidence or explicit language from legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of the statute." In re Seidel, 752 F.2d 1382, 1385 (9th Cir. 1985).

The Wisconsin court found a "clear" intent to preempt by applying a fundamentally flawed preemption analysis to the legislative history of FIFRA so as to turn long-standing Supreme Court preemption law on its head.

The Wisconsin court cites at 154 Wis. 2d at 31-32, 452 N.W.2d at 560-61, as a cornerstone of its holding the following passage from Maryland Pest Control, 646 F. Supp. at 113:

> Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between the two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation.

(Emphasis added.) The clear error in this analytical approach is that the issue in federal preemption cases is not, as the district and Wisconsin court couched it,

whether "the legislation as finally enacted did not include the proposed language . . . which would have authorized local pesticide regulation." Absent clear preemption, Wisconsin local governments were already authorized by the state to regulate in the field.[9] The rule not applied by these courts remains whether the intent to preempt authority already possessed by states and local governments clearly was preempted. Hillsborough, 471 U.S. at 715. This is the same argument made and rejected by this Court in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, reh. den., 465 U.S. 1074 (1984):

> Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress

[9]Cities, villages and towns (including the Town of Casey) are authorized to exercise the police powers of the state under Wis. Stat. §§62.11(5) (cities), 61.34 (villages) and 60.22(3) (towns). Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556; Hack v. City of Mineral Point, 203 Wis. 215, 218, 233 N.W. 82, 84 (1931).

> intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. Punitive damages have long been a part of traditional state tort law. . . . Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards.

(Emphasis added.)[10]

[10]This case should not create the "tension" between federal and state regulation in the same field as was seen in the case of Silkwood v. Kerr-McGee, 464 U.S. at 256 (Blackmun, J., dissenting at 259). This is not even an arguable case in which, "[w]here broad federal preemption has been found, the burden of proving an exception always should be on the party who wishes to rely on state law," 464 U.S. at 279, 464 U.S. at 274 n.1 (Powell, J., dissenting). The federal law at issue in Silkwood is significantly different from the law here. Most significantly, the federal act in that case evinced a clear Congressional intent that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 464 U.S. at 249, citing Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983). See also, 464 U.S. at 259-60, 263; (Blackmun, J., dissenting); 461 U.S. at 274, 279 (Powell, J., dissenting). Here, no broad intent to preempt exists in the federal law in question, and so the burden remains, even for the dissenting Justices in Silkwood, on those arguing

(continued...)

2. FIFRA's legislative history demonstrates the full Congress agreed to disagree on preemption of local regulation of pesticide use.

The Wisconsin Supreme Court majority found that the words in the federal act are unclear on the issue of local preemption. Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. It also recognized that the Congress fervently debated but failed to

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[10](...continued)
preemption. Unlike the Atomic Energy Act reviewed in Silkwood, FIFRA §24, 7 U.S.C. 136v, clearly evinces the intent not to preempt the entire field of pesticide regulation [§24(a)], leaving open the entire area to state (and local) regulation, expressly preempting only specifically limited areas such as pesticide labelling and packaging [§24(b)]. Thus, our case does not present the issue that split the Court in Silkwood. Because of this important difference, in our case it should not be troubling for the Justices who dissented in Silkwood to hold, as dissenting Justice Powell interpreted the majority's holding there, that the burden that must be met here is "to allow state law to prevail in the absence of a showing that Congress expressly had intended to pre-empt it." 464 U.S. at 279 (Powell, J., dissenting). The analysis to be followed here remains compatible with both the majority and dissenting views on preemption expressed in Silkwood.

expressly preempt local governments from regulating pesticides. Mortier, 154 Wis. 2d at 25-28, 452 N.W.2d at 558-59. See also id., 154 Wis. 2d at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting). The Wisconsin court derived a "clear" intent in FIFRA to preempt local regulation of pesticides primarily from legislative history, the interpretation of which numerous courts and justices differ.

Besides Wisconsin, at least

> [f]our other courts have examined the legislative history of FIFRA that the majority contends is "abundantly clear," majority op. pp. 25-26, and reached conflicting interpretations of Congressional intent. . . . Put in their best light, these cases suggest that the legislative history surrounding the enactment of FIFRA is ambiguous: courts reading the same documents have reached different conclusions.

Mortier, 154 Wis. 2d at 39, 452 N.W.2d at 564 (Abrahamson, J., dissenting).

An essential difference between the courts and judges that are split on the

preemption question is that those finding preemption reviewed the legislative history and approached the issue from the standpoint of whether Congress authorized local governments to regulate pesticides, Maryland Pest Control, 646 F. Supp. at 113; Mortier, 154 Wis. 2d at 27-32, 452 N.W.2d at 559-61, while those finding against preemption approached the issue from the standpoint of whether Congress clearly intended to preclude the exercise of retained authority. For example, see Deukmejian, 683 P.2d at 1158-61; Lebanon, 571 A.2d 1192-93. The latter is the correct analytical approach. Silkwood, 464 U.S. at 255.

An important fact discounted by the Wisconsin majority was that congressional committees and legislators confronted head-on the policy question whether local governments should be preempted from regulating pesticides. At the end of exhaustive debate and effort, the pre-

emption proponents failed to obtain from the full Congress an express provision or other amendatory language in FIFRA's preemption section to clearly limit or qualify the authority already possessed by municipalities to act in the field. See Mortier, 154 Wis. 2d at 41-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting), 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Instead, the court relied heavily on separate congressional committee interpretations of bills that preceded the Conference Committee version ultimately adopted by the full Congress. Although the Conference Committee bill voted on by the full Congress admittedly "did not consider the issue of local regulation of pesticides," Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559, the court found a clear intent to preempt from the previous separate

committee actions and statements of individual legislators.

There appears no better rendition of FIFRA's legislative history, and proper application of traditional preemption analysis, than in Deukmejian, 683 P.2d at 1158-61. See also, Mortier, 154 Wis. 2d at 26-28, 452 N.W.2d at 558-59 (majority opinion), 154 Wis. 2d at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting).

The House bill (H.R. No. 10729, 92nd Cong., 1st Sess. (1971)) did not address local preemption. Although the House Committee on Agriculture's initial report rejected a proposal that would have permitted political subdivisions of states to regulate pesticides (117 Cong. Rec. 40027 (1971)), it did not state that the bill's provisions should be understood to deprive political subdivisions from regulating pesticides. (H.R. Rep. No. 92-511, 1st Sess. at 16 (1971).) (Consistent with the

ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions, the proposal was unnecessary because political subdivisions already had tnis authority. In the preemption analysis, the failure to authorize states or local governments through "anti-preemption" provisions does not result in preemption.) The Senate Agriculture and Forestry Committee reported the House bill out, saying in its report that, by not expressly providing regulatory authority to local authorities, it is the intent of the law to deprive local governments of this authority. (Sen. Rep. No. 92-838, 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, 3993 at 4008.) The Senate Commerce Committee amended the bill assigning to local governments the authority to regulate the sale or use of pesticides. (Sen. Rep. No. 92-970, 2d Sess. (1972)

reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, at 4128.) The Senate Agriculture and Forestry Committee objected to the Commerce Committee amendments. (Pt. II, Sen. Rep. No. 92-838, 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. & Admin. News, No. 3, starting at 4023.) The compromise substitute to the Commerce Committee, without the Commerce Committee's "anti-preemption" provision, was reported out without objection from the Agriculture and Forestry Committee (118 Cong. Rec. 32257-58 (1972)). The Senate passed H.R. 10729 without a dissenting vote (id., at 32262 (1972).) The Conference Committee report, passed by both houses, was silent on the issue of local preemption (id., at 33924, 35546). Deukmejian, 683 P.2d at 1158-59.

In Deukmejian, the court properly rejected the notion that even the failure of congressional committees to adopt language

authorizing local governments to regulate can serve as a substitute for statutory language depriving them of such authority. "The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate." Id. at 1160 (emphasis added). "The history of the Senate proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected." Id. at 1161 (emphasis added).

The court also recognized that the full Congress voted on a Conference Committee bill that was silent on preemption.

> The Conference Committee Report did not comment on the language giving states power to regulate, and there is no reason to conclude that the subsequent House approval of the Conference Committee Report reflected an understanding that the provision

> giving the states power to adopt more restrictive regulation impinged upon the states' authority to delegate powers to local agencies.

Id. at 1160-61.

The courts in Maryland Pest Control, 646 F. Supp. at 113, and the Wisconsin Supreme Court, Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559, noted that on the floor of the Senate, Senator Allen inserted in the Congressional Record a portion of the Agriculture and Forestry Committee report which included the statement that FIFRA "should be understood as depriving" local governments of regulatory authority. It must first be said that it is a legislature's responsibility to enact legislation, and not for its committees or individual legislators to interpret it.[11]

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[11]In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24, reh. den. (1976), (citations omitted), the Court there said:

> Remarks of this kind made in the course of legislative debate or
>
> (continued...)

A committee report interpretation of a previous bill by a group of legislators is a frail substitute for insertion of an express amendment in legislation that is later voted on.[12] Referring to Senator

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[11](...continued)
> hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. . . . This is especially so with regard to the statements of legislative opponents who "[i]n their zeal to defeat a bill . . .understandably tend to overstate its reach."
>
> "And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).
>
> "Also, legislators' remarks during a floor debate, even in the Congress that enacted the legislation, do not control statutory interpretation and generally are not accorded significant weight." Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984) (citations omitted).

[12]"Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." Thompson

(continued...)

Allen's maneuver, Wisconsin's dissenting Justice Abrahamson observes,

> the majority opinion relies upon language added to the congressional record immediately prior to the final vote of the Senate to support its finding of preemption. . . . Upon examination of the Congressional Record, I find that the language relied upon by the majority opinion is simply a restatement of the report of the Senate Committee on Agriculture and Forestry already cited by the majority. . . . For the reasons previously set forth, the Committee report is a questionable indication of congressional intent regarding the preemption of local regulation of pesticides.

Mortier, 154 Wis. 2d at 43, 452 N.W.2d at 565-66 (citations and footnote omitted).

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[12](...continued)
v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). "Although individual committee recommendations may be persuasive, they do not dictate what the intent of the law is when it is adopted by the full Congress. That Congress debated the issue at great length without providing clear indications of preemption leads to the conclusion that no federal preemption was intended." Mortier, 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

What the Senator inserted into the Congressional Record was not a part of the legislation adopted by the Senate, let alone both houses, and so cannot expressly preempt local regulation. What the record does show is Senator Allen did not insert clear preempting language in the law. At best, his maneuver might reflect a Senate interpretation of the first compromise bill which made no mention of either preemption or specific authorization of local regulation. Moreover, it was not agreed upon by the House and so cannot suggest the intent of the whole Congress to preempt local regulations.

There was a further Senate/House conference whose final result became the compromise FIFRA law. In it there was express language on preemption, and no language regarding specific preemption of local regulation. What was passed by both houses was legislation with no specific

reference to either local preemption or authorization, and a conference report which did not even mention the question of local regulation. Mortier, 154 Wis. 2d at 28, 452 N.W.2d at 559; Deukmejian, 683 P.2d at 1160-61.

The most solid conclusion here is that there was no agreement to clearly preempt local authority. "The record of House proceedings fails to reflect any understanding that local regulation was prohibited." Deukmejian, 683 P.2d at 1160. The Senate Agriculture and Forestry Committee could not get preemption language into the law, and the Senate Commerce Committee could not get specific authority language into the law. Both possibilities were considered, but neither was enacted into law. Without agreement, there can be no Congressional intent to preempt.

> Rather than indicating that the group intended FIFRA to preempt local action, the more plausible explanation is that Congress

> never resolved the issue of preemption. In the interest of reporting a bill in the current session of Congress, members of both Senate committees agreed to disagree on the issue of preemption of local regulation.
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> . . . .
>
> . . . Congress worked for nearly two years attempting to forge the delicate compromise necessary to pass a pesticide bill. The bill was considered highly controversial and was at risk of being defeated at nearly every turn. A number of speakers, including then Senator Gaylord Nelson of Wisconsin, rose to speak on the highly partisan nature of the debate and the fragility of the compromise reached on all sides. In this turbulent political environment, the Senate never specifically considered the issue of preempting local governmental power, suggesting that the issue was not reached in the interest of passage of a pesticide bill.
>
> The legislative history and the highly partisan nature of the debate suggest that Congress was unable to agree about preemption of local regulation. While the compromise struck in FIFRA may have been necessary to ensure passage of the bill, I do not think that it demonstrates Congressional intent with sufficient certainty to deprive the citizens of the Town of Casey

> of the power to protect themselves and their environment.

Mortier, 154 Wis. 2d at 42-43, 44, 452 N.W.2d at 565-66 (Abrahamson, J., dissenting) (footnotes omitted).[13]

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[13]At Mortier, 154 Wis. 2d 30 n.17, 452 N.W.2d at 560 n.17, the Wisconsin majority opinion adds as "indicative of the EPA's authoritative construction of the congressional intent of FIFRA to exclude pesticide regulation below the state level"; this comment:

> Moreover, the commentary to federal regulations promulgated pursuant to FIFRA, although after the fact of congressional action, expresses the administrative determination of the EPA that "It is not the intention of the Act or of these regulations to authorize political subdivisions below the State level to further regulate pesticides." 40 Fed. Reg. 11700.

Mortier, 154 Wis. 2d at 30, 452 N.W.2d at 560. This bald conclusion is merely an agency comment unaccompanied by any rationale and appears only in a section analyzing a proposed agency rule governing state certification of pesticide applicators. This is hardly worthy of consideration in a case where sovereign state powers are at stake and respondents seek blanket preemption of any and all local regulation of pesticides.

Given the tremendous doubt that exists within the legislative history of FIFRA regarding the intent of the full Congress to preempt local regulation of pesticide use, that doubt must be resolved in favor of municipalities acting under their delegated state authority.

G. There Is No Implied Preemption Of State Or Local Units Of Government In The Federal Regulatory Scheme.

1. Because federal regulation of pesticides is not comprehensive or adequate, there is no inference to be made of a congressional intent to preempt local governments in the field.

Even though the Wisconsin Supreme Court "majority opinion does not rest on the premise that FIFRA is pervasive and thus occupies the field," Mortier, 154 Wis. 2d at 38 n.3, 452 N.W.2d at 563 n.3 (Abrahamson, J., dissenting), the court invoked as part of its rationale for finding preemption City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 633, as "illustrative of this type

of determination of congressional intent to preempt from the pervasive nature or completeness of the examined congressional scheme." Mortier, 154 Wis. 2d at 22-23, 452 N.W.2d at 557. The court's misplaced invocation of Burbank[14] came at the invitation of respondents who have repeatedly alleged pesticide regulation is "comprehensive" and "extensive," and needs sufficient uniformity to be effective.[15]

From these characterizations, respondents implicitly invite the Court to

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[14]Mortier, 154 Wis. 2d at 36-38 n.3, 452 N.W.2d at 563 n.3 (Abrahamson, J., dissenting); Hillsborough, 471 U.S. at 717-18.

[15]Respondents' Brief In Opposition To Petition For Writ of Certiorari at 18-20. Such factual allegations in briefs are improper, especially on a motion for summary judgment where such allegations were not made or proven, were disputed by defendants in their pleadings and briefs, and where they go to an implied claim of unreasonableness--a challenge that was not raised or made by plaintiffs-respondents in their motion. Because the claims raise issues of disputed fact, they are wholly inappropriate, aside from being incorrect.

accept unfounded and disputed factual and policy assumptions that because there are numerous pages of federal and state regulations, already there must be adequate regulations to protect citizens and the environment from the toxic effects of pesticides.

Such claims, if this Court were tempted to entertain them, are not only disputed by petitioners (and thus are not proper for consideration on this appeal), but simply are not true. Federal and state regulation of pesticides is not "extensive" or "comprehensive." Petitioners remain prepared to show the courts, if necessary, the regulatory gaps left open in both the state and federal pesticide regulatory "scheme." We are also prepared to show the inadequacies in the enforcement and administration of those laws, as well. These gaps and inadequacies pose, we would show, that the public, including Town of

Casey residents, and the environment, such as our groundwater, are and continue to be exposed to serious and significant risks from the harmful effects of pesticide chemicals.

It is these continuing risks that give rise to the legitimate right of local governments to address those unanswered risks at the local level.

> Pesticides are chemicals or biological substances used to destroy or control weeds or unwanted plants, insect, fungi, rodents, bacteria, and other pests. Pesticides protect our food crops, non-food crops, ourselves, our homes, our pets and livestock. Pesticides are a mixed blessing: they contribute significantly to agricultural productivity and to improved public health through the control of disease-carrying pests, but they can adversely affect people, non-target organisms such as fish and wildlife, and the environment. Because pesticides are designed to kill and control living organisms, exposure to them can be hazardous. Some pesticides exhibit evidence of causing chronic health effects such as cancer or birth defects. Some pesticides persist in the environment over long periods of time and accumulate in the tissues of people, animals, and plants.

General Accounting Office (GAO), PESTICIDES --EPA's Formidable Task To Assess And Regulate Pesticides (April 1986), page 10, attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit F.

The above-cited 1986 report amounts to no less than an indictment of EPA's failure to fully register a single pesticide since FIFRA was amended in 1972. It states in part:

> Most of the 50,000 pesticide products registered (licensed) for use today have not been fully tested and evaluated in accordance with current testing requirements. These tests are required to determine, among other things, a pesticide's potential for causing chronic (long-term) effects in humans, such as cancer and reproductive disorders, birth defects, and environmental damage. . . .
>
> . . . .
>
> At its current pace, EPA's reassessment and reregistration efforts will extend into the 21st century due to the magnitude and

complexity of the tasks involved. Until EPA completes this effort, the health and environmental risks and benefits associated with older pesticides and their uses will not be fully known.

. . . .

As of March 31, 1986, EPA had not completed a final reassessment on any pesticide active ingredient--the first one is due by the end of the year. EPA has, however, completed preliminary assessments of 124 of the 600 active ingredients. Preliminary assessment means that EPA has evaluated the data on file and identified additional areas where testing may be needed to complete reassessment. . . . EPA plans to develop final reassessment after receipt and review of the required data. . . .

. . . .

From the inception of the special review program in 1975 through October 31, 1985, EPA completed 32 special reviews. . . . However, EPA's special review process for dealing with pesticides where new evidence raises a concern about a significant health or environmental risk, has generally taken 2 to 6 years--contrary to EPA's goal of quickly making decisions on potentially hazardous pesticides. During this period, the public and the environment may be exposed to

potentially hazardous pesticides.

. . . .

EPA's reregistration effort is further complicated by emerging pesticide concerns. EPA has identified about 100 inert ingredients with known or suspected toxic concerns that need to be considered along with over 800 inerts for which EPA has insufficient data to determine potential hazards. EPA's ability to obtain data on inerts may be constrained by the pesticide law's restrictions on disclosing information on inerts, which are considered trade secrets. This legal constraint makes it difficult for interested chemical firms to avoid duplicative testing that may be required by EPA. . . .

Id. at 2-4 (emphasis added).

See also GAO, NONAGRICULTURAL PESTICIDES--Risks and Regulations (April 1986), attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit G. In 1989, GAO provided Congress with an update on its 1986 reports, summarizing as follows:

> Our follow-up work shows that EPA has not completely assessed any of the 822 pesticides subject to reregistration but is close on at least three. Thus, it has not completed all product

> reregistration actions for any pesticide, although it has reregistered some products. In addition, EPA has been able to completely reassess the safety of pesticide residues on food for only 4 of the approximately 387 food-use pesticides subject to reregistration because of gaps in knowledge about the toxicity and exposure of most food-use pesticides. . . .
>
> While FIFRA '88 will help accelerate EPA's review of older pesticides, reregistering pesticide products and reassessing tolerances remain formidable tasks.

Testimony, Statement of Peter F. Guerrero, Associate Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, GAO, Before the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development Committee on Environment and Public Works, United States Senate (May 15, 1989), at 1-2.[16]

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[16]Petitioners would be pleased to present this document to the Court and the parties on request.

In a more recent report on lawn care pesticides, GAO states:

> As with most pesticides, these chemicals have the potential to create serious problems affecting human health and the environment. The range of concerns about the risks of pesticides has expanded to include potential chronic health effects, such as cancer and birth defects, and adverse ecological effects. Currently, these pesticides are being applied in large amounts without complete knowledge of their safety. . . .
>
> Last May GAO testified before this Subcommittee on the status of EPA's reregistration program and concluded that EPA had not made substantial progress in reassessing the risks of pesticides. . . .
>
> Of the 34 most widely used lawn care pesticides, 32 are older pesticides and subject to reregistration. Not one of these, however, has been completely reassessed. . . . Until EPA completes its reassessments and takes appropriate regulatory action, the public's health may be at

risk from exposure to these pesticides.

GAO, LAWN CARE PESTICIDES--Risks Remain Uncertain While Prohibited Safety Claims Continue (March 1990) at 2, 3, 5.[17]

At the state level, see Wisconsin Legislative Audit Bureau Report 86-20, A Management Audit of Department of Agriculture, Trade and Consumer Protection (DATCP) (June 1986), attached to Public Intervenor Motion to Intervene (R. 6:1-13) as Exhibit H, which states DATCP's pesticide regulation "program is seriously weakened because of deficiencies in . . . the timely and effective resolution of pesticide misuse complaints." Id. at 3. The report stated "concerns about the thoroughness and completeness of the investigative work done by some inspectors" and "inadequate supervisory review of investigation reports

[17]Petitioners would be pleased to provide copies of this report to the Court and the parties on request.

is at least responsible for fieldwork deficiencies." Id. In addition, the auditors "are concerned that the central office is not fully meeting one of its most important responsibilities, to quickly and effectively resolve pesticide complaints." Id. Numerous case files were examined and cited as examples of inadequacies in Wisconsin's pesticide enforcement program.

It is because federal and state regulation of pesticides has been shoddy at worst, incomplete and overburdened at best, incapable of addressing pesticide risks at the local level, that it is crucial states retain the authority to delegate to local governments the power to protect citizens from pesticide hazards.

2. Federal regulation of pesticides is not comprehensive or pervasive.

The Town of Casey ordinance fills glaring gaps that neither federal nor state laws address. It provides a rational,

deliberate, informed decision-making process to permit the use of pesticides in local areas after serious consideration of the specific pest problem, specific local conditions, and the need to use proposed pesticide chemicals in light of other chemical and non-chemical alternatives. Ord. No. 85-1 §1.3(2). Neither federal nor state laws do these things. In addition, it provides for reasonable conditions under which pesticides may be applied, and public notice so citizens may make informed choices about exposing themselves to treated areas. Ibid, §1.3(3)(4). Federal and state laws do not provide for these reasoned decisions to be made, nor the protections they afford. The local ordinance is complementary to the federal regulatory scheme and consistent with its purpose to protect public health and the environment.

Under the federal and state laws[18] no one is required under local circumstances to: 1) consider the risks to people and the local environment of using pesticides, and to compare them to the risks of not using them or using alternative pest control methods; 2) consider the effectiveness and risks of using alternative non-chemical methods and chemicals; 3) consider the risks of registered pesticides that have not been reregistered by EPA or which are undergoing "special review" because they are strongly suspected of causing unreasonable risks or harm to local humans or the environment; 4) consider the effects of the pesticides on local humans, animals, plants or the environment; or 5) implement added protections necessary to reduce or eliminate the risks of using pesticides under unique local conditions, such as timing of

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[18]See FIFRA [7 U.S.C. §§136-136y]; Wis. Stat. §§94.67-94.71 (1989); 40 C.F.R. subch. E (1990); Wis. Admin. Code ch. Ag 29 (1990).

applications. The Casey ordinance does these things, and without conflicting with federal or state regulations.[19]

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[19]Respondents' "conflict preemption" claim was not addressed by the Wisconsin Supreme Court, although it was acknowledged as follows:

> Under the express words of the supremacy clause, state law must give way to contradictory or incompatible provisions of a congressional enactment. The plaintiffs assert that, in practice, that must be the result here, for on its face the Town of Casey ordinance could prohibit completely the use of FIFRA-approved pesticides by FIFRA-approved label instructions. While, as a matter of law, we do not disagree with the plaintiffs' premise, the situation in light of the record is a hypothetical one, for no such complete prohibition is posed by the facts, and we need not address the plaintiffs' assertion in light of our reliance on the legislative history, which we conclude demonstrates a clear and manifest congressional intent to preempt all local regulation.

Mortier, 154 Wis. 2d at 23-24, 452 N.W.2d at 557. There are two reasons this conflict preemption claim must fail. First, as dissenting Justice Steinmetz points out, "[n]o affirmative license or general permit

(continued...)

Unless the Wisconsin Supreme Court decision is reversed, all local units of government will be hamstrung in their ability to carry out their deep-rooted responsibilities of protecting their citizens' health, safety and local environments from the real hazards of toxic chemical pesticides.

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[19](...continued)
has been issued for pesticides by the state or federal government" by virtue of mere pesticide registration. Id. at 45, 452 N.W.2d at 566-67. Thus, local regulation does not interfere with any overriding federal policy favoring pesticide use. Second, because FIFRA §24(a) expressly contemplates states as being able to regulate "use of any federally registered pesticide (emphasis added)," there can be no conflict when registered pesticides are regulated. Cf. Rominger, 500 F. Supp. at 471; Ferebee, 736 F.2d at 1541; Southern Pacific, 325 U.S. at 769. This brings us full circle back to the implied preemption issue whether Congress clearly intended local governments to be preempted from regulating use of registered pesticides under FIFRA §24.

3. Comprehensiveness of federal regulation is not indicative of congressional intent to preempt state or local regulation in the same field.

Even if federal regulation of pesticides were comprehensive, this Court has rejected the notion that congressional intent to regulate comprehensively in a field evinces a clear and manifest intent to preempt state and local regulation.

No better case illustrates this than the United States Supreme Court's decision in Hillsborough, where the Court upheld local regulation of blood plasma centers and the procedures for assuring wholesomeness of blood supplies. Despite comprehensiveness of the congressional statute and federal regulations governing activities in the same field, the Court refused to find congressional or agency preemption of the ordinance. The Court stated:

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations

> than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. See Jones v. Rath Packing Co., 430 U.S., at 525, 97 S.Ct., at 1309.
>
> . . . Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.

Id., 471 U.S. at 717-18. The Court also rejected the dominant-federal-interest-in-the-field argument.

> We are unpersuaded by the argument. Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all

> related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive.

471 U.S. at 719. Unlike the federal government's dominant interest in foreign affairs, "those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily, and historically, a matter of local concern. See Rice v. Santa Fe Elevator Corp., 331 U.S., at 230, 67 S.Ct., at 1152." Id. Given that there was no clear indication of federal intent to preempt, and the deference with which the Court reviews challenged ordinances, the Court concluded these ordinances were not preempted by the comprehensive federal scheme. Id., 471 U.S. at 716, 719.

H. The Wisconsin Decision Puts FIFRA In Conflict With The Drinking Water Act And Federal Programs That Encourage Local Regulation Of Pesticides To Protect Groundwater.

As a result of the Wisconsin, sixth circuit and Maryland federal court decisions preempting local governments from regulating pesticide use, states and local governments are getting diametrically opposed messages from Congress and the federal government on protection of groundwater from pesticides. Such inconsistency should be taken into account and avoided under the judicial rule of statutory construction, consistent with the Supremacy Clause and Tenth Amendment analyses, that "where two statutes are '"capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (emphasis added); citing Regional Rail

Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

On the one hand the Wisconsin court decision predictably will be interpreted to mean that under FIFRA local governments may not protect the health, safety and welfare of their citizens from pesticides, even where the object of the regulation is to protect from pesticide contamination groundwater supplies that serve the drinking water, domestic use and environmental needs of affected communities.

On the other, the federal government has sent strong messages to the states and local governments that they, not the federal government, must take the lead role in protecting local groundwater supplies from pesticides. FIFRA itself, although not mentioning groundwater specifically, implies that local governments are authorized to adopt pesticide regulatory laws, such as to

protect local ground and drinking water supplies, for which the goal of cooperative uniformity is to be sought. 7 U.S.C.§ 136t(b). More specifically, the Safe Drinking Water Act Amendments of 1986 require the states to develop programs "to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons." 42 U.S.C. §300h-7(a) (1988).[20]

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[20]Respondents, in their brief in opposition to the petition for certiorari at 20, state, "Petitioners raise a new issue not presented in the Wisconsin courts, by claiming that the preemption of local regulations presents a conflict with the federal Safe Drinking Water Act."

First, petitioners did not discover this issue until the time of the petition for certiorari preparation.

Second, the policy that compels the need to reconcile the operation of laws so as to avoid conflicts between them and to allow their full operation overrides any convenient argument of "waiver," especially where the issue is purely one of law and the parties are not prejudiced in the least because of the full opportunity to brief the issue. United States v. Speers, 382 U.S. 266, 277 n.22 (1965).

The programs are required "to specify the duties of . . . local governmental entities, and public water supply systems," §300h-7(a)(1), and must contain, among other things, "implementation of control measures . . . to protect the water supply within wellhead protection areas from such contaminants." §300h-7(a)(4). Local governments are hardly in a position now to implement zoning or other regulatory control measures to protect groundwater in wellhead protection areas from pesticides under the recent ruling by the Wisconsin Supreme Court.

This is particularly disturbing given the deeply rooted interests of the states and local governments in protecting their citizens' safety, Hillsborough, 471 U.S. at 719; Brown v. Hotel & Restaurant Employees, 468 U.S. 491, 502 (1984), from toxic pesticides.

"Pesticide pollution of ground water has recently become a major issue in the United States." Osteen, C., et al., Agricultural Pesticide Use Trends and Policy Issues, United States Department of Agriculture, Agricultural Economic Report No. 622 at 48 (September 1989).[21] "With over 50 percent of the nation's population relying on ground water for their drinking water source, we cannot underestimate the seriousness of pesticides occurring in ground water." E.P.A. Office of Pesticide Programs, Pesticides In Ground Water Data Base 1988 Interim Report at 1-7 (December, 1988).[22] "In 1987, the U.S. Environmental Protection Agency documented 19 pesticides occurring in ground water from 24 states

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[21]Petitioners would be pleased to provide copies of this document to the Court and the parties on request.

[22]Petitioners would be pleased to present this document to the Court and the parties on request.

attributed to agricultural practices." Ibid (citation omitted).

> Nielsen and Lee estimated that 1,128 counties had potential pesticide contamination of ground water. Approximately 46 million people use ground water that may be contaminated with pesticides. About 18 million people rely on private wells that are more susceptible to contamination than deeper, regulated public wells. Ground water in 1,437 counties, or about 46 percent of counties in the conterminous States, may be contaminated by pesticides or nitrogen fertilizers. . . . The ground water contamination potential is especially acute in regions of the Corn Belt, Lake States, eastern seaboard, and gulf coast. . . . The EPA is proposing plans that emphasize State management of ground water problems. . . .

Osteen, at 48. Indeed, Wisconsin has taken up the invitation by enacting a comprehensive groundwater law, 1983 Wisconsin Act 410, which in sections 19,[23]

[23]See Wis. Stat. §59.97(1) (1989).

20[24] and 21[25] amend local police power statutes "to encourage the protection of groundwater resources." "Since it is reasonable to assume municipalities may act to protect groundwater supplies, it would be an anomaly to find that these same municipalities cannot act to also protect their food supplies, homes, work and recreational areas from pesticide contamination." Mortier, 154 Wis.2d at 52-53, 452 N.W.2d at 570 (Steinmetz, J., dissenting).

In Ruckelshaus, the Court found it "entirely possible for the Tucker Act and FIFRA to co-exist." 467 U.S. at 1018. Under the rules governing both the traditional statutory interpretation and Supremacy Clause analyses, the wellhead protection provisions of the Safe Drinking

[24]See Wis. Stat. §60.74(1)(a)7 (1989).

[25]See Wis. Stat. §62.23(7)(c) (1989).

Water Act that encourage state and local governments to protect groundwater supplies from pesticides should not be in potential conflict with FIFRA.

Federal agencies, acting under their congressionally delegated authority, are sending an equally clear message to state and local governments to protect their groundwater supplies from pesticides.

In August 1984 the U.S. EPA Office of Ground-Water Protection published its Ground-Water Protection Strategy.[26] There, EPA identified pesticides as a significant source of groundwater contamination. Id. at 13, 15. EPA's strategy for protecting groundwater contemplates states and their local governments taking the lead protection role, with the EPA providing technical and financial support. Id. at 33-52. "EPA believes that the most effective and broadly

[26]Petitioners would be pleased to present this document to the Court and the parties on request.

acceptable way to strengthen institutional capability to protect (ground) water is to strengthen State programs." Id. at 35. In turn, state programs include a strong local government role.

> Local governments can also play a major role in ground-water protection. They derive their authorities from State environmental statutes or from related, powerful authorities, such as those to protect public health and to control land use. . . .

Id. at 23 (emphasis added). In its follow-up report specifically dealing with protection of groundwater from pesticides, the EPA more directly enunciated the local role it contemplated as part of the national strategy.

> Since pesticides are a potential source of contamination for public water supply wells and critical aquifer protection areas, EPA anticipates that many State and local governments will seek to develop programs that address this source. . . .
>
> . . . .

> The Agency recognizes that technical information on practices to reduce these risks is needed to help in the design and implementation of programs addressing pesticide contamination at the State and local levels.

EPA Office of Ground-Water Protection, Protecting Ground Water: Pesticides and Agricultural Practices (1988) at 3 (emphasis added).[27]

The traditionally "powerful authorities" of local governments to protect their citizens from pesticide contaminated ground and drinking water supplies will be largely eviscerated if local governments are preempted from regulating pesticides as part of their groundwater protection schemes. More significantly, the messages being received by local governments from the federal government on protecting groundwater from pesticides is now inconsistent and

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[27]Petitioners would be pleased to present this document to the Court and the parties on request.

confused. This absurd result should have been avoided by interpreting FIFRA consistent with the retention of the states' right to delegate pesticide regulatory authority to their local governments.

> I. Under the Supremacy Clause Analysis, Where The Congress Expressly Allows States To Retain Their Authority To Regulate In A Particular Field, The Contrary Intent To Preempt The States From Delegating Their Authority Within That Field To Their Local Governments Should Be Equally Clear.

The Wisconsin Supreme Court held that by expressly not preempting state regulation of pesticide use under FIFRA §24 [7 U.S.C. §136v], Congress impliedly denied permission to the states to delegate that same authority to their local governments. As a result, no longer is the question in preemption cases whether a federal law clearly preempts the states along with their local governments from acting in a field, e.g., see Hillsborough, 471 U.S. at 712; Garcia v. San Antonio Metro. Transit Auth., 469 U.S.

528, 575, reh. den. (1985); Deukmejian, 683 P.2d at 1160, 1161. Now it is whether federal laws, even where they expressly allow the states to act, may be implied to have preempted the states from delegating to their local governments without the equally "clear and manifest purpose of Congress" already expressed.

We respectfully ask this Court to hold that where the Congress with one hand expressly permits the states to act in a particular field, and where states are ordinarily free to distribute their regulatory authority to their political subdivisions, the "clear and manifest purpose" test behind Supremacy Clause jurisprudence should require that the intent to take back that authority with the other hand be equally ~~clear~~ through express preemption. Anything less will continue to

result in the confusion on the issue that now reigns in the nation's courts.[28]

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[28]The very idea in preemption law of "implied intent that is clear and manifest" is itself oxymoronic, and difficult to administer. By definition, intent that can only be discerned by implication is unexpressed, and therefore not necessarily clear. The split by the courts trying to apply the concept is ample evidence of its mischief.

If the law of "clear and manifest" preemption that respects the role of states and local governments in our federal system is to have meaning, then where the Congress specifically expresses in a law its intent to preempt, and does so as specifically and carefully as it did in FIFRA so as to broadly allow states to act in the field, that expression of intent should be considered to be complete, if not conclusive. In such cases, no contrary intent to preempt states from delegating otherwise permissible duties and authorities to their local governments should be invented by resort to matters outside the statute in which the express preemption provisions appear. This is not to be taken to suggest that conflict preemption be abandoned. It is merely to recognize that because Congress has the means by which to make its preemptory intent clear in the laws it enacts, it is not asking much for that intent to be made clear through its unambiguous expression.

J. If Left Intact, The Wisconsin Supreme Court Decision Forces The Issue Whether, Under Fundamental Principles Of Federalism Embodied In The Tenth Amendment, FIFRA May Be Interpreted To Prevent The States From Delegating Authority Within Their Own Governmental Structures.

As in all the other cases decided and pending on the federal preemption question presented here, there is no "intimation that the state of Wisconsin or its political subdivisions lack the police power to enact pesticide regulations." Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556.

The Wisconsin Supreme Court's holding, and those like it, necessarily presume that as Congress allowed the states to continue exercising their authority in the field, Congress at the same time may and did retain control as to how the states may exercise this retained power.

The Wisconsin Supreme Court decision brings us perilously close to the fundamental constitutional issue whether the

Congress may, consistent with fundamental principles of federalism embodied in the Tenth Amendment, tell the states how they may delegate authority within their own governmental structures.[29]

Although it was the view of four dissenting Justices of this Court in Garcia, 469 U.S. at 560, that the Court's "decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause," 469 U.S. at 560 (Powell, J., with whom the Chief Justice, Rehnquist, J., and O'Connor, J., joined, dissenting), even the majority of the Court observed looking beyond that case: "If there are to be limits on the Federal

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[29]In Deukmejian, the California Supreme Court acknowledged the same issue, but avoided it by holding that because local governments were not preempted from regulating pesticide use under FIFRA, "[t]his conclusion makes it unnecessary to determine whether Congress could validly limit the power of the state to distribute internally its traditional powers of regulation." 683 P.2d at 1161 n.11.

Government's power to interfere with state functions--as undoubtedly there are--we must look elsewhere to find them." 469 U.S. at 547.[30] The Court may be confronted with the need to find one of those limits where, as in this case, an interpretation of FIFRA cannot be reconciled with the states' right to delegate and assign their police powers to their subdivisions.

Although the Court in Garcia rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 546-47, the functions examined there did not go to the heart of state governmental structure or the

[30]For example, the majority view in Garcia would still recognize a line of constitutional demarcation defining impermissible federal action where that action "is destructive of state sovereignty or violative of any constitutional provision." 469 U.S. at 554.

states' prerogatives of how to delegate the exercise of power within that structure. This case does. See Deukmejian, 683 P.2d at 1160-61. Regardless of the manner or standard by which the Court might revisit this issue within the factual context of this case, there is no more fundamental function of state government that deserves protection from federal intrusion than assigning duties and delegating police power authority to state subdivisions and local governments, Garcia at 575 (Powell, J., dissenting, discussion accompanying n.18); Deukmejian, 683 P.2d at 1158, 1160, 1161.[31] This Court has consistently held that a state is free to delegate any power it possesses under the Tenth Amendment to its political subdivisions. See generally, Buck v. California, 343 U.S. 99 (1952) (a state

[31]For example, "it is for the states to determine whether their reserved powers shall be exercised directly, by political subdivisions, or by both." Deukmejian, 683 P.2d at 1161.

is free to delegate its legitimate police powers to its political subdivisions); Folsom v. Township Ninety-Six, 159 U.S. 611 (1895) (states are free to delegate lawful powers to political subdivisions).

There are many governmental structures and means available to the states to carry out legitimate state policies and objectives, not the least of which is the protection of public safety, health, and the environment from toxic pesticide chemicals. While some states may choose to assign state level agencies this task, others may find it more desirable to assign it to their local or regional subdivisions. Deukmejian, 683 P.2d at 1160-61. States may make this choice for various reasons including considerations of costs, existing governmental structures already carrying out similar functions, and political acceptability. No one knows more about these factors than state and local elected

or appointed officials.[32] For example, suppose a state were to choose to exercise its retained authority to regulate pesticide use by delegating exclusive authority or assigning duties to counties to carry out state policies, standards or programs.[33]

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[32]Powell, J., dissenting, Garcia at 574 n.18:

> The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. E.g., The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

[33]"'The science of government . . . is the science of experiment" in which the states should remain able to "serve as laboratories for social and economic experiment." Garcia, 469 U.S. at 546, citing Anderson v. Dunn, 6 Wheat. 204, 226, 5 L.Ed. 242 (1821), and New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). See also Garcia, 496 U.S. at 567 n.13 (Powell, J., dissenting). Since 1921, with the enactment of ch. 242, Laws of 1921, Wisconsin municipalities have had conferred

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Under the Wisconsin Supreme Court holding, that option no longer appears to be available. Because FIFRA has been

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on them "all the powers that the legislature could by any possibility confer upon" them. Hack v. City of Mineral Point, 203 Wis. at 218, 219, 233 N.W. at 84. As a result, municipalities have been experimenting with the authority to form their own policies and laws to protect the health, safety and welfare of their citizens. Also starting at that time, Wisconsin has been conducting a government experiment in which municipalities have played key roles in carrying out state policies. Examples: local enforcement of traffic regulations in conformity with state standards (Wis. Stat. §349.06). Municipalities are being called on to execute state policies particularly relating to protecting statewide interests in water resources and the environment, while tailoring appropriate regulations to particular local needs and conditions. As examples, municipalities are charged under Wis. Stat. §§59.971, 61.351, 62.23(7), and 62.231, with the duty of enacting shoreland and shoreland-wetland zoning laws "[t]o aid in the state's role as trustee of its navigable waters and to promote the health, safety, convenience and general welfare, . . . for the efficient use, conservation, development and protection of this state's water resources." Wis. Stat. §144.26(1) (emphasis added). Similar state-local partnerships are established with respect to floodplain zoning (Wis. Stat. §87.30), and groundwater. Focusing on "the role local governments can play in a conjunctive state

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interpreted to have preempted local governments from regulating pesticides, the

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and local regulatory scheme to protect groundwater quality" in Wisconsin, Yanggen, D., et al., "Groundwater Quality Regulation: Existing Governmental Authority and Recommended Roles," 14 Colum. J. Envtl. L. (1989) at 6, observes:

> Significantly, the new Wisconsin groundwater law (1983 Wis. Act 410) provides for three optional programs at the local government level which address the issues of land disposal of septage, county well code ordinances, and zoning to encourage the protection of groundwater. By providing for these local government programs, the legislature established a de facto state/local partnership in groundwater protection and thereby evinced an intention to allow local governments to share the responsibility for groundwater protection.

Ibid at 10 (footnotes omitted).

The evolving experimental use of local governments as instrumentalities of the state to carry out state policy is not merely an abstract concept. For the purposes of the analysis to be applied in this case, the state-local partnership is not merely to be presumed, but is very real and working in Wisconsin. It should be viewed as extraordinary for the Congress to say state governments may not continue it.

states necessarily have been deprived the option of assigning pesticide regulatory responsibilities to their local governments.[34] This occurs, ironically, under a federal law that expressly allows, as the Wisconsin court held, states to continue regulating pesticides.

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[34]Respondents argue in their brief in opposition to the petition for certiorari at 14-15, "there is nothing inappropriate or unusual about a Congressional scheme which preempts local regulation but leaves regulation at the state level intact," citing Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), reh. den., cert. den., 414 U.S. 855 (1973); Consolidated Rail Corporation v. Smith, 664 F. Supp. 1228 (N.D. Ind. 1987); Chesapeake & Ohio Railway v. City of Bridgman, 669 F. Supp. 823 (W.D. Mich. 1987). These cases do not stand for this proposition, are inapposite, distinguishable, and largely suffer from the same flawed reasoning utilized by the Wisconsin and Maryland courts.

First, while it is true the courts held under the federal law at issue there that, while states could enact regulations on railroad safety, local governments were preempted from doing the same, they did not address the potential constitutional problem posed here.

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The constitutional issue posed here could have been avoided had the Wisconsin Supreme Court abided by "the

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Second, the "railroad cases" were just that--cases dealing with a completely different federal railroad transportation safety statute. Unlike FIFRA, the federal railroad safety statute broadly preempted state and local regulation in the field, and created exceptions for narrow situations, thus prompting the kind of preemption analysis seen in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm., 461 U.S. 190, 212-13 (1983): "When the Federal Government completely occupies a given field or an identifiable portion of it, . . . the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" Also, unlike FIFRA, the railway safety statute requires uniformity of regulation, but for the narrow exception where there is no conflicting federal regulation on the matter locally regulated. Bridgman, 669 F. Supp. at 825. This overriding congressional policy of uniformity drives the preemptive intent found by the courts in these cases. Id.; Donelon, 474 F.2d at 1112; Consolidated Rail, 664 F. Supp. at 1238. Dissimilarly, FIFRA §22(b) [7 U.S.C. §136t(b)] merely encourages uniformity.

Third, the Donelon and Bridgman courts superficially applied the "express mention, implied exclusion" rule to jump to the conclusion municipalities are not included

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'"cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."'" U.S. v. Security Indus. Bank,

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in the term "States" for the purpose of determining preemption under the express anti-preemption provisions in the law. In Bridgman, the court says,

> The plain language of the exception, however, indicates that only a state may adopt a more stringent railway safety law in response to a local safety hazard. . . . Since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits . . . .

669 F. Supp. at 826. As this definition of the term "State," used in the preemption exception rule of FIFRA §24(a), yields an absurd result when applied to the express preemption rule in FIFRA §24(b), so too this yields the same result when applied to the express provisions preempting state actions in the railroad statute, i.e., local governments could regulate where the states may not.

At least in the Consolidated Rail case, the judge implicitly rejected the simplistic line of reasoning in the other cases, and
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459 U.S. at 78; citing Lorrilard v. Pons, 434 U.S. 575, 577 (1978); quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).

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understood that municipalities are creatures of state legislatures, often act as arms of the state, and normally should be included within the statutory contemplation of "State." "If the local ordinances conform with either of these provisions [exceptions], they will not be preempted." 664 F. Supp. at 1236. However, this court went on to hold that the local regulation in question could not coexist with existing federal regulations (conflict preemption). Id. at 1236-37. This court also looked to other indicia of state intent not to delegate railroad regulatory authority to local governments, and to other indicia of congressional intent to allow only state level governments to act within the non-preempted regulatory area. 664 F. Supp. at 1237. No similar indicia of preemptive intent are to be found in our case. For example, there is no mention in FIFRA, as in the rail statute, of state regulation by "'law, rule, regulation, order or standard,'" found by the court in Consolidated Rail at 1237, to be indicia of state level agency actions allowed under the federal statute. The express preemptory provision in FIFRA §24(b) refers to labelling and packaging "requirements" that are preempted, and allowed regulation of "sale" and "use," all terms that can apply equally to local regulatory actions.
(...continued)

The constitutional issue still can and should be avoided by interpreting FIFRA in a manner that is consistent, and not on a collision course, with fundamental principles of federalism.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Wisconsin and remand the matter with instructions to enter judgment in favor

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(...footnote continued)
The court also said that because municipalities are not mentioned in the rail statute, an inference is raised that Congress did not intend to include municipalities in with "States" for which the preemption exceptions are provided in the law. 664 F. Supp. at 1237. Even if this analysis were valid, municipalities are mentioned in FIFRA, at §22(b) [7 U.S.C. §136t(b)] where localities are fairly contemplated as adopting regulations, the uniformity of which is encouraged through voluntary cooperation.

For these reasons, the railroad cases are inapposite, distinguishable, and of no persuasive effect on the disposition of our case.

of petitioners declaring valid the Town of Casey Ordinance 85-1.

Dated this 26th day of February, 1991.

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